

1 what you just read.

2 JUDGE SIPPEL: Let's go off the record
3 just a minute.

4 (Whereupon, the foregoing matter went off
5 the record at 1:22 p.m. and went back on
6 the record at 1:32 p.m.)

7 JUDGE SIPPEL: We're back on the record.

8 MR. COOK: Yes, Your Honor. We were
9 talking about Exhibit Nos. 1 through 7.

10 JUDGE SIPPEL: Yeah, well, okay. We have
11 gotten one through seven identified. I'll pick up
12 again where I was.

13 The tabbed documents one through seven of
14 Complainants' Volume 1 of 3 exhibits are marked for
15 identification as Complainants' Exhibits 1 through 7,
16 and there being no objection, they're received in
17 evidence as Complainants's Exhibits 1 through 7.

18 (Whereupon, the documents
19 referred to were marked as
20 Complainants' Exhibit Nos. 1
21 through 7 for identification and
22 were received in evidence.)

1 JUDGE SIPPEL: All right. Your next
2 batch.

3 MR. COOK: The next group, Your Honor, is
4 eight, nine, and ten, and these all relate to things
5 that, again, Mr. Harrelson has used in his preparation
6 of his expert opinion.

7 Eight is some notes that he prepared on
8 Complainants' 50 poles.

9 Nine is simply a photo enlargement with a
10 copying machine of a chart of 40 of the 50 poles that
11 Gulf identified that were surveyed by Osmose.

12 And number 10 are some excerpts from some
13 recommended practices for coaxial cable construction
14 and testing that Mr. Harrelson also used in
15 formulating his opinion in this case.

16 So those eight, nine, and ten are all
17 things that Mr. Harrelson relied upon or used in the
18 course of coming to his opinion in this case.

19 JUDGE SIPPEL: Any objection?

20 MR. CAMPBELL: We don't have an objection
21 to either eight or nine, and ten we don't really have
22 an objection to. However, it is a more complete

1 document, and we would ask that in the interest of
2 completeness the entire booklet be entered into
3 evidence. It is not that voluminous, is my
4 understanding, and I think it may help put the excerpt
5 in context if we have the entire booklet in there.

6 So subject to that, we would not have an
7 objection.

8 JUDGE SIPPEL: Okay. Mr. Cook, do you
9 have any --

10 MR. COOK: Your Honor, I have not seen the
11 booklet. I don't think we would have any objection to
12 that. The question would simply be as a matter of
13 timing and practicality could we locate a copy of the
14 entire booklet.

15 I had thought that the entire booklet was
16 in myself.

17 MR. SEIVER: No, but I'm sorry to tag-team
18 this, but my understanding was that that's all that
19 Mr. Harrelson has, but I will follow up to see if he
20 has the entire booklet or just these excerpts.

21 JUDGE SIPPEL: All right. Well, the
22 important thing is I'm going to allow it to come in

1 with these experts, but certainly the other side is
2 entitled to have the entire booklet, and they're to
3 get that at your -- I don't want to say as soon as
4 practical. Certainly by the time that the hearing
5 commences on the 24th so that a copy is given to the
6 other side.

7 MR. COOK: I think this is a published
8 document that would have to be ordered, Your Honor,
9 and it's just a question of how fast that could be
10 gotten.

11 JUDGE SIPPEL: Well, let's get on it and
12 expedite it then.

13 MR. COOK: Okay.

14 JUDGE SIPPEL: Let me see. That's another
15 item. So this is ten. It's Complainants' Exhibit 10.

16 Then these documents I have now have been
17 identified. They're Tab 8 through 10, are now to be
18 marked for identification as Complainants' Exhibits 8
19 through 10 and are received into evidence at this time
20 as Complainants' Exhibits 8 through 10.

21 (Whereupon, the documents
22 referred to were marked as

1 Complainants' Exhibit Nos. 8
2 through 10 for identification and
3 were received in evidence.)

4 JUDGE SIPPEL: And your next grouping.

5 MR. COOK: The next grouping is perhaps
6 the easiest. Eleven and 12 are two very important
7 publications, and we actually have a courtesy copy of
8 the published books for Your Honor here. This is the
9 National Electrical Safety Code and the National
10 Electrical Safety Code Handbook.

11 JUDGE SIPPEL: And, Mr. Campbell, does
12 your side have that?

13 MR. CAMPBELL: We do, Your Honor.

14 JUDGE SIPPEL: All right.

15 MR. COOK: And I should add that as Your
16 Honor will see in the course of the testimony, these
17 specifications become directly relevant to the case
18 because they go to the question of spacing on the
19 poles between attachments and between different
20 parties.

21 JUDGE SIPPEL: Well, let me be sure I got
22 this right. Well, let me receive them into evidence

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1 first.

2 The tabbed documents that are tabbed 11
3 and 12 are marked for identification as Complainants'
4 Exhibits 11 and 12 and are received in evidence as
5 Complainants' Exhibits 11 and 12.

6 And I have to be sure these are clear in
7 these books. Complainants's No. 12 -- I'm sorry.
8 Number 11 is the safety code and 12 --

9 MR. COOK: Is actually also. It looks
10 like there was one letter left out of the title on the
11 index page. Twelve is the National Electrical Safety
12 Code Handbook, or NESC.

13 JUDGE SIPPEL: All right. So this one,
14 the big one, is the handbook.

15 MR. COOK: Yes, Your Honor.

16 JUDGE SIPPEL: Is that 12?

17 MR. COOK: Yes, Your Honor.

18 JUDGE SIPPEL: Thank you.

19 (Whereupon, the documents
20 referred to were marked as
21 Complainants' Exhibit Nos. 11 and
22 12 for identification and were

1 received in evidence.)

2 JUDGE SIPPEL: Okay. Do we have those in,
3 11 and 12? The next group.

4 MR. COOK: Okay. The next two items would
5 be 13 and 14, and here I think there was simply Mr.
6 Campbell and I perhaps didn't catch every single
7 overlapping thing in our effort to cross things off
8 because 13 is actually part of Gulf Exhibit 4.
9 Thirteen is Gulf Power CATV permit record, and Your
10 Honor previously admitted it this morning as part of
11 Gulf Exhibit 4.

12 And Number 14 similarly was admitted this
13 morning as part of Gulf I believe it's 44, and that
14 14, for the record, is information on average numbers
15 of communications attachments on Gulf Power poles.

16 JUDGE SIPPEL: Is there any objection?

17 MR. LANGLEY: No objection.

18 JUDGE SIPPEL: Then the tabbed documents
19 as 13 and 14 Tabs for the Complainants are identified
20 as Complainants' Exhibits 13 and 14 and received in
21 evidence as Complainants' Exhibits 13 and 14.

22 (Whereupon, the documents

1 referred to were marked as
2 Complainants' Exhibit Nos. 13 and
3 14 for identification and were
4 received in evidence.)

5 JUDGE SIPPEL: And the next?

6 MR. COOK: The next grouping would be the
7 following four items, 15, 16, 17, and 18. These are
8 pole diagrams and measurements made by field
9 supervisors from each of the four Complainant cable
10 operators in this case who Gulf has taken the
11 depositions of, and actually we'll get to this later,
12 but, Your Honor, both Gulf and we filed our notices of
13 intent to cross examine witnesses on Friday, and at
14 the end of each of the filings on Friday there was a
15 stipulation to the authentication on those exhibits,
16 and similarly, we stipulated to the authenticity of
17 Osmose data.

18 So here these are measurements, just
19 coming back to the main point, measurements and
20 diagrams of the 50 poles that were identified on
21 January 27th as Complainants' 50 pole identification.

22 JUDGE SIPPEL: Any objection?

1 MR. LANGLEY: No objection.

2 JUDGE SIPPEL: There being no objection,
3 the tabbed documents 15 through 18 are marked for
4 identification as Complainants' Exhibits 15 through 18
5 and are received in evidence as Complainants' Exhibits
6 15 through 18.

7 (Whereupon, the documents
8 referred to were marked as
9 Complainants' Exhibit Nos. 15
10 through 18 for identification and
11 were received in evidence.)

12 JUDGE SIPPEL: Next grouping.

13 MR. COOK: Okay. Number 19 is just, I
14 guess, by itself in the sense that this is a letter
15 from one of the individuals that Gulf Power has
16 designated as a witness, Michael Dunn, to someone
17 named Keith Gregory at Cox Communications, one of the
18 Complainant cable operators in this case enclosing a
19 proposed new pole attachment agreement for the year
20 2000, I believe, yes.

21 After the cover letter it says "pole
22 attachment agreement between Gulf Power Company and

1 Cox Communications Gulf Coast," and this is relevant
2 and useful in this case because it is an example of
3 the new terms and conditions that Gulf wanted the
4 cable operators to accept after they purported to
5 terminate the then existing negotiated contracts with
6 each of the four cable operators.

7 JUDGE SIPPEL: Any objection?

8 MR. LANGLEY: Your Honor, we don't have
9 any objections. That is not to say that we agree with
10 the point for which they're seeking to introduce them,
11 but we have no objection.

12 JUDGE SIPPEL: All right. It's received
13 as a genuine document that has relevance. This is
14 tabbed document Exhibit 19, which is now identified
15 for the record as Complainants' Exhibit 19, and it is
16 received in evidence as Complainants' Exhibit 19.

17 (Whereupon, the document referred
18 to was marked as Complainants'
19 Exhibit No. 19 for identification
20 and was received in evidence.)

21 JUDGE SIPPEL: Your next grouping, please.

22 MR. COOK: The next grouping is a larger

1 number from 20 through 27, and these are eight
2 exhibits which are simply examples of correspondence
3 between the two parties in this case, with the
4 correspondence going from Gulf Power to each of the
5 four Complainant cable operators announcing or
6 describing the new pole attachment rate that Gulf
7 Power sought to impose on the cable operator, and in
8 most instances the rate was around \$38.06 for the year
9 2000 and \$40.60 for the year 2001, and so for each of
10 the four operators what we have in these exhibits is
11 a letter from Gulf Power saying, "Here's the new
12 rate," and then a corresponding reply letter from a
13 representative of the cable operators saying, "We
14 don't believe this new rate is appropriate. We don't
15 believe it's fair, and we don't believe it's
16 authorized under the FCC regulations, and we will
17 continue to pay you at the previously negotiated
18 contract rate." And those are set forth.

19 So that's kind of a back-and-forth from
20 each of the four Complainant cable operators with Gulf
21 Power there.

22 JUDGE SIPPEL: Any objection?

1 MR. LANGLEY: No objections.

2 JUDGE SIPPEL: Okay. Then the documents
3 which are tabbed 20 through 27 are marked for
4 identification as Complainants' Exhibits 20 through 27
5 and are received in evidence as Complainants' Exhibits
6 20 through 27.

7 (Whereupon, the documents
8 referred to were marked as
9 Complainants' Exhibit Nos. 20
10 through 27 for identification and
11 were received in evidence.)

12 JUDGE SIPPEL: And your next grouping?

13 MR. COOK: The next one, and this is the
14 last one before objection, is 28, and this is the
15 Osmose proposal for joint use audit, January 14th,
16 2005, and this is a document that has preceded the
17 statement of work, which Your Honor has already
18 admitted in this case, and that begins to outline the
19 terms and work that Gulf Power's pole surveyor,
20 Osmose, was going to do in this case.

21 JUDGE SIPPEL: Any objection?

22 MR. LANGLEY: No objection.

1 JUDGE SIPPEL: Tab 28, marked for
2 identification as Complainants' Exhibit 28 and
3 received in evidence as Complainants' Exhibit 28.

4 (Whereupon, the document referred
5 to was marked as Complainants'
6 Exhibit No. 28 for identification
7 and was received in evidence.)

8 JUDGE SIPPEL: Okay. Where are we now on
9 an item of contention?

10 MR. COOK: We're now at an item, several
11 items of contention that run from 29 through 36, and
12 these are the monthly status reports that Your Honor
13 required when Your Honor suggested that Gulf Power go
14 out and get a pole survey done to document the
15 conditions on its poles.

16 Basically you may recall in your order of
17 FCC 05M-23 of April 15th you had said, "Gulf Power
18 represents that it cannot identify specific poles it
19 contends are crowded or at full capacity until this
20 pole audit is completed, and Gulf Power will be
21 submitting month end status reports."

22 These items of contention from 29 through

1 36 we believe should not be in contention, are very
2 relevant because they reflect the results of the work
3 done by Osmose over that period of time. They
4 initially start with status reports from a series of
5 months, and then they get to what Your Honor termed a
6 preliminary report last September 30th, and a final
7 report, I believe, was either October 17th or maybe
8 October 31st.

9 And I would submit that these reports are
10 not only directly relevant and important because you
11 had asked for them. They went out, hired this
12 auditor, work was done. But they contain very
13 significant information about what Osmose did during
14 the course of these things.

15 For example, if you look at 29 you see
16 that at a certain state in time so many poles were
17 reviewed on the first pass, which we learned through
18 taking a deposition of Mr. David Tessieri, an Osmose
19 representative, meant an eyeball review of the pole,
20 and a certain number of poles are looked at on a
21 second pass, which we learned a second pass is the
22 only instance where someone from Osmose actually used

1 what's called a "hot stick" to go and measure
2 separations and differences and heights of attachment
3 on the poles.

4 And by following these reports, you can
5 determine what happened with the survey at what time
6 and also why Osmose did not finish the survey that you
7 set out to be requested.

8 JUDGE SIPPEL: What is the relevance?
9 What is the relevance of this?

10 MR. COOK: Well, the relevance would be
11 looking at both the methods and the accuracy of the --
12 well, not so much the accuracy, but the methods and
13 the value of the measurements in terms of how many
14 poles were evaluated, what was done to evaluate them,
15 and also where they were evaluated, and what measures
16 Gulf claims that it should be entitled to take based
17 upon the results of these things.

18 For example, at the end, if you go to Tab
19 36, you see that Gulf talks about a percentage of
20 crowded poles being 74 percent of its poles. To the
21 extent that this proceeding, which looks at 50 poles
22 designated by them and 50 by us, to the extent that

1 Gulf intends to try to argue at some point that
2 certain poles that it selected in this proceeding are
3 representative of its conditions more generally and to
4 extend the results of the Osmose survey to those poles
5 in this proceeding and in another proceeding, I think
6 they're pretty directly relevant.

7 JUDGE SIPPEL: All of them? I mean what
8 about just limiting it to the preliminary and the
9 final? Why do you need all of those leading up to it?

10 MR. COOK: Well, because I think it gets
11 into a number of issues as to how Gulf handled the
12 Osmose report. One of the things that Gulf did was
13 represented to Your Honor in these reports, for
14 example, in the April and May and particularly the
15 June report, that all of the information that was
16 being collected was going to be collected and that the
17 survey would continue on and get a variety of
18 different information.

19 But what we have found out through the
20 deposition of Mr. Tessieri and another exhibit that
21 you got in this morning, Osmose weekly status reports
22 given to Gulf Power but not shared with Your Honor, is

1 that in fact there was a decision made in May of last
2 year to stop the survey, to not take any more data
3 about specific poles, and that with respect to the
4 poles that had already been surveyed, that there was
5 going to be a monetary amount, which Gulf said at
6 \$100,000 which it did not want to exceed with respect
7 to Osmose.

8 So I think this is very significant
9 because what we have in these reports are
10 representations to Your Honor as the Court and to us
11 as an opposing party that the survey would continue,
12 that it would keep on going. In fact, we all relied
13 on it, and that's what we waited for throughout the
14 summer, but we intend to show Your Honor as one
15 important consideration about the reliability of this
16 survey and what was going on that a decision was made
17 as early as May to basically stop the survey because
18 they didn't want to pay any more money for it.

19 JUDGE SIPPEL: Mr. Langley.

20 MR. LANGLEY: Yes. A couple of things
21 about 29 through 36. First and foremost, these are
22 all documents that are in the nature of pleadings.

1 They are attorney's statements. Much like their
2 briefs, they're not admissible as evidence in the
3 case. They will always be part of the record, but
4 there's a distinction between the record pleadings and
5 the evidence in the case, and this is not evidence in
6 the case.

7 To the extent that what they want to show
8 are the statistics and the timing, those things are
9 all part of the source documents which were admitted
10 earlier by Your Honor as Gulf Power Exhibit 41. Those
11 are the actual Osmose weekly reports that came from
12 Osmose and they were shared with Your Honor and the
13 other side. They were shared with the other side
14 prior to the Osmose depositions, and they were shared
15 with Your Honor when we submitted our exhibits to the
16 court.

17 So the first and probably most
18 fundamentally important reason that 29 through 36
19 should not come in is that they are pleadings and
20 attorney's statements which are generally recognized
21 as inadmissible as evidence.

22 The second reason, and I think I already

1 covered this to some degree, is that they are -- to
2 the extent that they would otherwise be admissible,
3 which they are not, they are duplicative of the source
4 documents which are in evidence, the Osmose weekly
5 reports.

6 And if I understood them correctly, their
7 main purpose in introducing these reports is to
8 somehow suggest that Gulf Power gamed the system.
9 Well, if that's the point they want to make, they can
10 make it without these documents. They can cross
11 examine our witnesses. We strenuously disagree with
12 the point that we're trying to make, and we've even
13 been in court before talking about the status of the
14 Osmose audit, the fact that it stopped at a point and
15 we had intended to resume it, and ultimately never
16 did.

17 So this is nothing new for the Court.
18 Bottom line here is that 29 through 36 though do not
19 come into evidence, should not come into evidence
20 because they are attorney's statements and pleadings
21 which are not admissible.

22 JUDGE SIPPEL: Any response to that?

1 Short response.

2 MR. COOK: Short response. Your Honor, we
3 recognize that these are prior pleadings and can be
4 referred to, but I would point out two things. First,
5 we would like to and we intended to mark them at least
6 for identification and also for relevance for both
7 Your Honor's reference, but we believe that insofar as
8 they report the factual results to us and to Your
9 Honor of the work done by Osmose that they are
10 relevant because Your Honor, by authorizing them to go
11 and do an audit to find out what poles are at full
12 capacity and to have a study by a qualified third part
13 consultant or accountant with respect to each pole,
14 these are the results that we got over a period of
15 about six months in response to Your Honor's
16 direction.

17 In other words, they are results that are
18 directly material to this case.

19 JUDGE SIPPEL: I've heard enough. I tend
20 to agree with Mr. Cook's characterization of it.
21 That's what I was asking for. I wasn't asking for a
22 general statement in terms of everything is moving

1 along just fine. I really wanted some hard numbers,
2 and you were giving them to me.

3 MR. COOK: Your Honor, I would at this
4 time --

5 JUDGE SIPPEL: Yes, go ahead.

6 MR. COOK: -- I have noticed that one or
7 two of these tabs may have missed a page due to the
8 duplications. So to the extent that that has
9 occurred, I will immediately arrange to make sure that
10 you and all of the parties have all of the correct
11 pages.

12 JUDGE SIPPEL: All right. Well, thank
13 you.

14 In any event, I'm going to overrule the
15 objection, and, yes, please, if you feel -- well, you
16 certainly have to let the other side know what it is
17 that you're inserting in the exhibits here.

18 MR. COOK: We would contemplate filing
19 something like notice of corrected tabs and serving
20 full copies on all the parties.

21 JUDGE SIPPEL: All right, all right.

22 MR. CAMPBELL: Your Honor, if I might note

1 for the record, and the problem with this type of
2 document coming into evidence is you get on that
3 slippery slope, but the problem with this type of
4 document is that this is classic hearsay. It is an
5 attorney statement.

6 And the case law, and I might just cite a
7 couple of cases for the record, Your Honor, United
8 States v. Causey, which is 2006 U.S. District Court
9 Lexus 1847. It says that hearsay statements of what
10 various attorneys allegedly told defense counsel are
11 not admissible as evidence, and that another case, the
12 Central Owner Light Case, 349 F3rd, goes on to say
13 denials and pleadings and briefs and those types of
14 filings, court filings are not evidence in the case.

15 It is hearsay documentation. It is in the
16 record. The real data, the documents, the Osmose data
17 is in the record. The status of that is in the
18 record. The source documents were admitted this
19 morning and shared with everyone, and so this is
20 classic hearsay.

21 And what happens is then we take this
22 document and springboard to other pieces of advocacy

1 and pleadings that are in the record, and the line
2 becomes very difficult. Why is this hearsay
3 admissible and other hearsay is not? It's very
4 difficult.

5 This is classic hearsay. There's no
6 exception to the hearsay rule that justifies admission
7 of this evidence, and we just want to make that for
8 the record.

9 JUDGE SIPPEL: Well, I think that I am
10 going to draw a distinction, and the rules of evidence
11 under the Administrative Procedures Act are somewhat
12 different than the -- although I try to apply the
13 Federal Rules as much as I can, we do have a little
14 more discretion, and as I say, I am accepting these.

15 I have been accepting these right along,
16 not to say that it might be accurate to the pole, but
17 that I was getting substantially accurate information
18 when I was getting these reports.

19 And to the extent that the Complainants
20 feel they have some kind of a credibility issue out of
21 this, I'm certainly not going to permit counsel to be
22 called and to testify. I mean, that's not going to

1 happen.

2 The best that they can do is use the
3 numbers for whatever they are worth, compare them
4 perhaps with the final reports. I don't know what you
5 exactly intend to do with these, Mr. Seiver.

6 MR. SEIVER: Well, Your Honor, I kind of
7 looked at them like answers to interrogatories. I
8 think they're something that could be a statement
9 against interest. It could be an admission. I'm not
10 sure. I didn't really go that deep in it because we
11 did look at them as factual statements about the
12 number of poles and what was going on.

13 JUDGE SIPPEL: Well, they are really
14 designed to keep me informed as to whether or not this
15 thing is being conducted -- let me say it again.

16 They are really -- the idea for the report
17 was so that I had a good, firm grasp that the work was
18 actually being done. As I say, a general statement to
19 me once a month saying that everything is fine is not
20 going to do the job. So I'm not looking to create or
21 preserve evidence for ultimate use in the hearing.
22 All I'm trying to do is being sure that they, and

1 particularly through the counsel and the parties, that
2 the Osmose people are doing their job.

3 If they're wasting their time, they're
4 wasting my time. I mean I am not so much concerned
5 about the money, but I don't want our time being
6 wasted.

7 Go ahead. One more.

8 MR. LANGLEY: I was going to say if these
9 are coming into evidence, may we have an opportunity
10 to supplement the record with, for example, a portion
11 of the transcript where we have previously addressed
12 this?

13 If my statements are going to come in
14 through these, I'd like for the issue to be complete.

15 JUDGE SIPPEL: Now, you know, after I
16 heard the proffer as to what they might be used for,
17 I am very, very much concerned about opening this
18 record to an irrelevant and possibly frivolous inquiry
19 that is going to lose focus of the real issue in this
20 case.

21 What I will do -- well, what my ruling is
22 is what are we talking about now? Twenty-nine through